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No. 86-998

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAPAN AIR LINES COMPANY, LTD. ET AL., PETITIONERS

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

Statutes:

Miscellaneous:

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Petitioners contend that the Civil Aeronautics Board (CAB)[1] erred in determining that a cargo rate—the Export Inland Contract Rate (Ex/In Rate)—once offered by Northwest Airlines, Inc. (Northwest), for transportation between Chicago and Seattle was a rate offered in domestic rather than in foreign air transportation.

1. The Federal Aviation Act of 1958 (the Act), 49 U.S.C. App. (& Supp. III) 1301-1552, distinguishes domestic air transportation from "foreign air transportation" (49 U.S.C.

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[1]The CAB's regulatory responsibilities were transferred to the Department of Transportation on January 1, 1985, pursuant to Section 1601 of the Federal Aviation Act of 1958, 49 U.S.C. App. (& Supp. III) 1551.

App. 1301(24), 1482(k)).[2] The classification of a fare or rate as one in "foreign air transportation" (generally referred to as an international fare or rate) is significant because international fares and rates must be filed in tariffs, and they are subject to review by the United States and by foreign governments.[3] By contrast, under Section 1601(a)(2)(D) of the Act, 49 U.S.C. App. 1551(a)(2)(D), fares and rates in domestic air transportation are no longer subject to government regulation.

The administrative proceedings in this case involved both the Ex/In Rate and certain "Visit USA" (VUSA) fares. The Ex/In Rate was offered for transportation of cargo between Chicago and Seattle but was only available for cargo destined for one of several specified points in Asia. The Ex/In Rate was offered without regard to the carrier used to transport the cargo between Seattle and Asia. Pet. App.

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[2]Domestic air transportation consists of "interstate" and "overseas" air transportation, the latter being limited to transportation between the United States and its Territories or possessions. Transportation that does not meet the definition of "interstate," "overseas," or "foreign" air transportation (such as a direct flight from one non-U.S. point to another) is not considered "air transportation" at all under the Act (49 U.S.C. App. 1301(10)).

[3]Section 403 of the Act, 49 U.S.C. App. 1373, requires the filing of international fares and rates in tariffs, and Section 1002 of the Act, 49 U.S.C. App. 1482, authorizes the Department of Transportation to investigate the lawfulness of international fares and rates. Section 1102(a) of the Act, 49 U.S.C. App. 1502(a), requires the Department to regulate air transportation in accordance "with any obligation assumed by the United States in any treaty, convention, or agreement" with another country. The international agreements relevant to this case give the Japanese and Swiss governments, respectively, the right to approve "[t]he rates to be charged by the airlines of either Contracting Party between points in the territory of the United States and points in the territory of Japan" (Pet. App. 161a-162a), and "[t]he rates to be charged by the air carriers of either contracting party between points in the territory of the United States and points in Swiss territory" (*id.* at 163a).

37a-38a. Petitioners, foreign air carriers whose fares and rates are generally subject to regulation by their governments, contended that the Ex/In Rate was international and therefore subject to foreign-government approval before being offered. Pet. App. 24a-26a. The VUSA fares were for passenger travel. Some VUSA fares, like the Ex/In Rate, are "unrestricted," and are available without regard to how the passenger travels between the foreign point and the United States. Other VUSA fares, however, are "restricted," *i.e.*, available only to traffic that uses specified carriers for transportation between the United States and the foreign point. Petitioners did not challenge the unrestricted VUSA fares in this proceeding but contended that the restricted VUSA fares were international. Pet. App. 30a-37a.

After an evidentiary hearing, an administrative law judge (ALJ) rejected petitioners' argument that a "flow of commerce" theory must be used to determine whether the rate or the fares were for foreign air transportation. The ALJ concluded instead that "[i]t is clear that the Board has not adopted the 'flow of commerce' theory as advocated by [petitioners]" (Pet. App. 111a). The ALJ recognized that the fares and rate were "novel" (*id.* at 116a). He found, however, that the fares and rate were "very close" to fares and rates that had historically been treated as international (*id.* at 120a), and he concluded that the Ex/In Rate and VUSA fares at issue should be classified as international (*id.* at 123a, 146a). The CAB reversed in part, holding that the Ex/In Rate was domestic; the CAB affirmed the conclusion that the restricted VUSA fares were international.[4] It

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[4]The CAB also addressed the status of unrestricted VUSA fares. Although no challenge to those fares was before it, the CAB thought it important, in light of the proper and unquestioned treatment of those fares as domestic, that its decision "adequately distinguish 'unrestricted' VUSA fares and make clear that the latter need not be filed" (Pet. App. 28a; see also Pet. App. 12a-13a n.3).

agreed that its precedent did not mandate the application of a flow-of-commerce test. The CAB explained that its historic practice had not been one of unquestioning reliance on flow-of-commerce analysis. Rather, "[w]here another test, such as a carrier's geographic operations, was more relevant to the statutory provision and policies at issue, flow of commerce principles were readily rejected." Pet. App. 56a (citing *Qantas Empire Foreign Transfer Traffic Case*, 29 C.A.B. 33 (1959)).

The CAB concluded that a carrier-restriction test should be used for determining whether the Ex/In rate and VUSA fares were domestic or international. This test "accord[s] with (1) economic reality [and] (2) competitive reality" (Pet. App. 29a) because if a "fare or rate is available on equal terms for sale by all willing participant carriers, there can be no doubt that it is economically independent of the international travel to which it is tied for marketing purposes. Put another way, the fare must stand on its own, competitively and economically, as a domestic fare." *Id.* at 64a. In addition, the CAB adopted its test to "strike a fair and reasonable balance between the competing, but legitimate, regulatory interests of both the U.S. and foreign governments" (*id.* at 63a).

Applying its test, the CAB determined that fares or rates such as the Ex/In Rate and the unrestricted VUSA fares, offered without regard to the international carrier used, would be treated as domestic fares or rates. By contrast, "carrier-restricted" fares or rates such as the restricted VUSA fares, which were available only to traffic that used specified international carriers, would be treated as international fares or rates. Pet. App. 63a-69a.

The court of appeals affirmed (Pet. App. 1a-22a). The court of appeals held that "[o]n its face the statute does not require that 'foreign air transportation' be defined by a

'flow of commerce' test" (*id.* at 9a). The court rejected petitioners' contention that the CAB was bound by its own precedent to follow a flow-of-commerce test, because "[i]t is apparent that the CAB has never stated that the 'flow of commerce' test is the *sole* test for determining whether air transportation is foreign" (*ibid.*). Rather, the court of appeals held that the CAB's "adoption of the 'carrier-restricted' test in this case was not a significant change from prior interpretations" (*id.* at 8a-9a). Accordingly, the court rejected petitioners' contention that "the agency has violated its obligation to interpret consistently the statutes under which it operates" (*id.* at 9a), and their argument that the principle of deference to an agency's interpretation of its organic statute was inapplicable (*id.* at 8a).

2. The decision of the court of appeals upholding the CAB's use of the carrier-restriction test is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review by this Court is not warranted.[5]

Petitioners contend that the CAB was bound to apply a flow-of-commerce test and to define the Ex/In Rate as international.[6] As the court of appeals noted (Pet. App. 9a), however, the statutory definition of "foreign air transportation" does not in terms require use of a flow-of-commerce test. Therefore, the court of appeals properly affirmed the

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[5]In addition to the substantive reasons for denying the petition, we note that Northwest charged the Ex/In Rate to only two shippers for a period of six months in 1981 (Pet. App. 37a), and Northwest has not used the rate since 1981. The tariff-filing status of a rate last charged over five years ago does not present an issue that warrants this Court's attention.

[6]Petitioners argue that " 'the essential character of the commerce' is the decisive test in resolving the status of a particular movement, * * * and that the shipper's [or passenger's] intent determines the essential character of the commerce" (Pet. 7 (citation omitted)).

CAB's decision that the Act permitted its use of the carrier-restriction test here. An agency's interpretation of its organic statute, of course, is entitled to substantial deference by a reviewing court if that interpretation is reasonable. See, *e.g.*, *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Petitioners argue (Pet. 11-13) that the CAB's choice of the carrier-restriction test is unreasonable, since it is assertedly inconsistent with numerous judicial and agency decisions that employed a flow-of-commerce test in interpreting other statutes. No court, however, has held that the Act's definition of "foreign air transportation" requires a flow-of-commerce test. By contrast, the CAB has consistently held that other criteria may be more appropriate "[w]here another test, such as a carrier's geographic operations, was more relevant to the statutory provision and policies at issue" (Pet. App. 56a, *quoted at* Pet. App. 11a). See also *Qantas Empire Foreign Transfer Traffic Case, supra; Tariff Flexibility Rulemaking Proceeding*, 46 Fed. Reg. 46787, 46792 (1981), aff'd mem. *sub nom. American Express Co.* v. *CAB*, 673 F.2d 550 (D.C. Cir. 1982); *Sitmar Cruise Lines*, 68 C.A.B. 1380 (1975).

This Court's decisions do not require application of a flow-of-commerce test. Petitioners rely on four cases[7] in which the Court determined that certain ground transportation was interstate rather than intrastate and that the ICC rather than state authorities had jurisdiction to regulate it. Those decisions construed statutes in which Congress had defined interstate transportation broadly so as to subject

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[7] *Texas & N.O.R.R.* v. *Sabine Tram Co.*, 227 U.S. 111 (1913); *Baltimore & O.S.R.R.* v. *Settle*, 260 U.S. 166 (1922); *United States* v. *Erie R.R.*, 280 U.S. 98 (1929); *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945).

the intrastate portion of interstate transportation to the comprehensive regulatory structure of the ICC. There is no reason to assume that Congress intended, in the Federal Aviation Act, to define "foreign air transportation" just as broadly so as to subject the domestic portion of international transportation to international proceedings rather than to Congress's own chosen regulatory (now, deregulatory) scheme.

In cases bearing no factual resemblance to the present case, the CAB has, to be sure, found some of those decisions helpful in distinguishing domestic from foreign air transportation,[8] and foreign air transportation from transportation that falls outside of the Act's provisions altogether.[9] Those CAB cases, however, all involved carrier-restricted travel, and there was no question in any of those cases about a carrier-restriction test. Those cases have no bearing on the question whether non-carrier-restricted travel should be deemed domestic or foreign.

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[8] *Resort Airlines Miami Stopover Investigation*, 19 C.A.B. 1 (1954) (carrier with only foreign and not domestic operating authority could offer stopovers in Miami only if they were of limited duration); *Eastern Airlines, Inc., Enforcement Proceeding*, 40 C.A.B. 745, 748 (1964) (carrier's offer of foreign rather than domestic fare for transport from U.S. points to Miami, based on brief sidetrip to Bahamas, raised "complex and novel legal issue" best dealt with through rulemaking); *Airfreight Forwarders, Revocations*, 65 C.A.B. 1605 (Bureau of Operating Rights 1974) (carrier could not avoid losing its domestic operating authority, on the basis of nonuse, just because its international shipments included transportation from one U.S. point to a U.S. gateway).

[9] *Canadian Colonial Airways, Inc.—Investigation*, 2 C.A.B. 752 (1941) (use of U.S. airspace and overnight stop in Jacksonville did not transform Canada-to-Bahamas trip into "foreign air transportation" subject to CAB jurisdiction; transportation was not "air transportation" at all within meaning of Act); *Air Tungaru-UTA*, 90 C.A.B. 606 (1981) (CAB had jurisdiction over entire U.S.-to-Tahiti route, including portion between Christmas Island and Tahiti flown by airline providing joint services with airline that flew U.S.-to-Christmas Island portion); *Air Florida-BIA Wet Lease*, 102 C.A.B. 730 (1983) (similar holding with respect to intra-European portion of continuous U.S.-to-Europe operation).

The CAB's decision here not to rely on a flow-of-commerce test is rational and consistent with past interpretations of "foreign air transportation." Application of a flow-of-commerce test under the Act could give foreign governments the power to review and disapprove fares and rates offered wholly within the United States. As the CAB observed in its *Tariff Flexibility Rulemaking Proceeding*, 46 Fed. Reg. at 46791-46792, the United States claims no such power to review fares and rates offered within foreign countries,[10] and a definition of foreign air transportation that would give foreign nations such a power over intra-U.S. fares and rates "is clearly at odds with the intent of the [Act]."[11]

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[10]"Our consistent practice has been to require the filing of foreign carriers' intra-border fares only to the extent that they are reflected in through or joint fares to U.S. points." 46 Fed. Reg. at 46791.

[11]Petitioners err in arguing (Pet. 17) that the *Tariff Flexibility Rulemaking* is not precedent for use of an alternative to a flow-of-commerce test. In that proceeding, the CAB held that fares for travel between U.S. points were domestic even though such fares could be combined with international fares for a through journey between a U.S. point and a foreign point. Petitioners contend that the CAB in fact applied the flow-of-commerce test in making this ruling, for the CAB (they say) merely recognized the "essential character" of these "combinable" fares as domestic. The CAB, however, in its order on reconsideration expressly considered—and rejected as "absurd"—a flow-of-commerce test focusing on passenger intent. As the CAB explained, if a passenger's intent were controlling, "so long as his itinerary included a foreign point, his entire journey would be in foreign air transportation," and the fare for any domestic segment included in such an itinerary would be subject to tariff-filing requirements as a foreign fare. *Tariff Flexibility Rulemaking Proceeding, Order on Reconsideration*, Order 81-11-58, at 2-4 (Nov. 10, 1981). The CAB affirmed its previous decision that fares that are merely combinable should be classified as domestic. Although the *Tariff Flexibility Rulemaking* is, as petitioners note (Pet. 17 n.9), distinguishable because it did not involve fares tied expressly to foreign transportation, the CAB correctly noted (Pet. App. 53a) that "there is nothing in the *Rulemaking* to suggest that the distinctions presented here by the marketing ties to foreign travel generally, or to particular carriers, necessarily requires [*sic*] a different result," *i.e.*, classification of the Ex/In Rate as international.

Moreover, even petitioners do not insist on the universal application of their flow-of-commerce test. VUSA-type fares without carrier restrictions have been offered by U.S. airlines since 1968. See *Discount U.S.A. Fares*, 48 C.A.B. 892 (1968). The CAB and foreign governments and carriers have considered them domestic (see Pet. App. 52a). Petitioners did not challenge the domestic status of the unrestricted VUSA fares before the agency (*id.* at 34a) or in the court of appeals. As the CAB observed, however, a flow-of-commerce test that focused on passenger intent would "render international * * * all VUSA fares" (*id.* at 56a).

b. Petitioners argue (Pet. 14-15) that the carrier-restriction test represents an unexplained departure from past agency practice. For reasons we have already discussed, and for additional reasons given by the court of appeals in its careful analysis of the issue (Pet. App. 9a-12a & n.2), petitioners are simply wrong.[12] The court of appeals correctly concluded that the CAB's adoption of the carrier-restriction test "was not a significant change from prior interpretations" (*id.* at 8a-9a).

In any event, the CAB provided detailed and economically sound explanations of why statutory policies did not support use of a flow-of-commerce test in this proceeding (Pet. App. 51a-63a) and of why it selected the carrier-restriction test (*id.* at 63a-67a). Petitioners offer no legal or economic analysis to challenge the CAB's conclusion, but only the ipse dixit that "[i]t is on its face unreasonable" to classify the Chicago-to-Seattle rate at issue here as domestic (Pet. 15). The CAB offered a more than sufficient explanation to overcome such a weak challenge on the merits.

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[12]Contrary to petitioners' suggestion (Pet. 16-17), the court of appeals correctly understood their flow-of-commerce test as focusing on "the 'essential character of the movement' " (Pet. App. 7a-8a) and rejected the test on that basis.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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